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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 406.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFFS IN ERROR.

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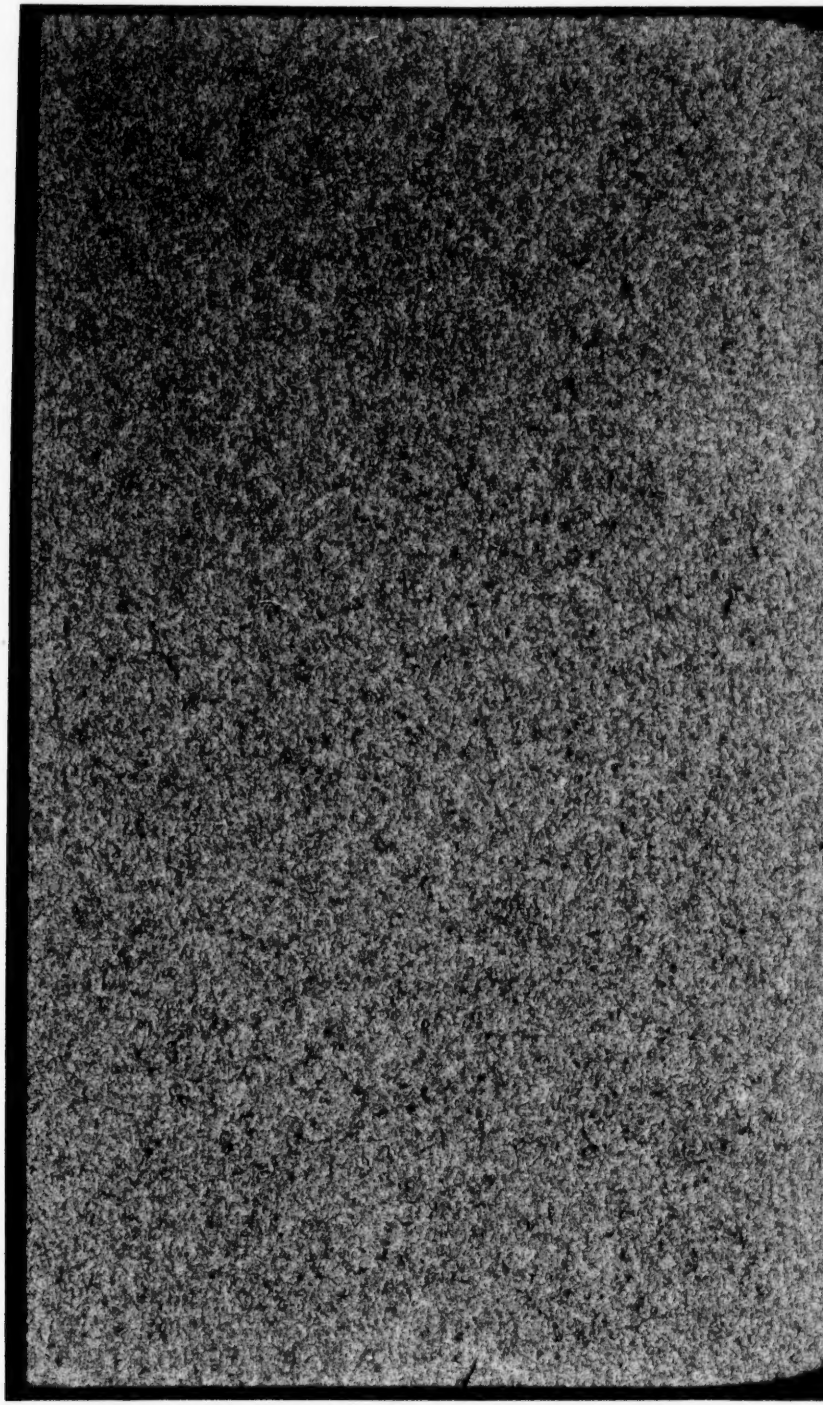

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SUPREME COURT OF THE UNITED STATES.

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No. 656.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This matter comes up on writ of error to the District Court for the Northern District of Ohio, Eastern Division.

The grand jury for the April term, 1917, found an indictment against the plaintiffs in error, in the same count with one Alphons J. Schue, who was charged with failing to register on June 5th, 1917, as required by the Selective Service Act and the President's proclamation thereunder. The plaintiffs in error were charged with aiding, abetting, counseling, commanding, inducing, and procuring Schue, "before and at" said date, not to register.

The plaintiffs in error filed a verified challenge to the grand and petit jury arrays, alleging, among other grounds, that (1) they were officers of the Socialist party, and the acts charged must have been done, if at all, in pursuance of their duties as such officers; the Socialist party was without representation on and excluded from representation on the jury commission, which was composed exclusively of their political opponents; the jury lists had been made up exclusively of Republicans and Democrats, who were their political opponents, and Socialists excluded; the grand and petit jury venires had been made up exclusively of their political opponents, who by reason of political hostility were prejudiced and not impartial; (2) they had, in pursuance of their duties as said Socialist officials, advocated the abolishment of rent, interest, and profit, and these political activities were directly involved in the case, while the jury lists and venires had been made up exclusively of men who derived their income from rent, interest, and profit, and were therefore hostile and prejudiced by reason of private interest; (3) the jurors were drawn exclusively from the Eastern Division of the District, and from only part of the counties within the division, contrary to the Sixth Amendment of the Constitution. The court heard the challenge on evidence, but ruled out as immaterial all testimony tending to show the political complexion of the juries and jury commissioners, to which rulings the plaintiffs in error excepted. The testimony of the clerk, Mr. Miller, was that he had not selected names for jury service himself, but had obtained lists from common pleas judges, and that all the names were of persons within the division; also that not all counties within the division had been drawn from. The court overruled the challenge, the defendants excepting.

The plaintiffs in error then filed their motion to quash, alleging, among other grounds, that (1) the grand jury had presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been pre-

sented to the grand jury or any witnesses sworn in a particular matter; (2) the indictment failed to state that Schue was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen at the time of the alleged offense; (3) the indictment failed to state the proclamation had been published at the time of the alleged offense, or was ever published; (4) it alleged three separate offenses in one count; (5) it failed to set forth any act or manner in which the plaintiffs in error did aid, abet, counsel, command, induce, and procure said Schue to commit the alleged offense, and failed to set forth the nature and cause of the accusation and apprise them of what they would be required to meet; (6) it charged the plaintiffs in error as accessories to a misdemeanor. The court overruled the motion, the plaintiffs in error excepting.

The plaintiffs in error offered to file their plea in abatement, repeating the allegation that the grand jury had brought in the indictment without evidence, but the court refused leave to file it, to which ruling they excepted.

Thereafter the plaintiffs in error filed their demurrer to the indictment, alleging, among other grounds, that (1) the facts set forth do not constitute an offense against the laws of the United States; (2) the Selective Service Act and proclamation thereunder are unconstitutional.

The court overruled the demurrer, the defendants excepting.

On the examination of the persons drawn for the petit jury, counsel for the plaintiffs in error attempted to examine them on their *voir dire*, for purposes of challenge, to ascertain if they distinguished between Socialists and anarchists, which line of examination the court refused to allow, the plaintiffs in error excepting.

The jury brought in a verdict of guilty; whereupon the plaintiffs in error filed their motion for a new trial and motion in arrest of judgment, reiterating among other grounds the points of error herein described. The court overruled the motions, to which the plaintiffs in error entered their

exceptions. And thereupon the plaintiffs in error sued out their writ of error herein.

Specification of Errors.

I. The trial court erred at the hearing of the challenge in refusing to admit testimony to show that the clerk of court was an adherent of the Republican party, the other jury commissioners were members of the Democratic party, and that the Socialist party, of which defendants were officers and members, was a minor political party within the district and was without representation on the jury board, contrary to defendants' constitutional right, as shown by the following (printed Record, pages 30 and 189):

> "Q. Can you give the names of the principal political parties in the district?
>
> "Mr. Wertz: I object.
>
> "The Court: The objection will be sustained.
>
> "Mr. Sharts: Exception.
>
> "Q. What is your political affiliation?
>
> "Mr. Wertz: I object.
>
> "The Court: The objection will be sustained.
>
> "Mr. Sharts: Enter an exception.
>
> "Q. Will you state, Mr. Miller, what were the political affiliations of Mr. May?
>
> "Mr. Wertz: I object.
>
> "The Court: The objection will be sustained unless you make your question in the form I indicated a moment ago.
>
> "Mr. Sharts: Exception.
>
> "Q. State whether or not Mr. May was a member of the principal political party in the district opposing that to which you yourself belonged.
>
> "A. He is.
>
> "Q. State whether or not he was a member of the same political party with Mr. Sullivan.

"Mr. Wertz: I object.

"The Court: The objection will be sus'ained.

"Mr. Sharts: Enter an exception, for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic party and that Mr. Miller is a member of the Republican party, and that the Socialist party is without representation on the jury board."

II. The trial court erred at the hearing of the challenge in refusing to admit the testimony of the clerk of the Cuyahoga County board of elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic parties, contrary to defendants' constitutional rights and section 276, Judicial Code, as shown by the following (printed Record, pages 185 and 38):

"Mr. Sharts: Now, if your honor please, I would like to call your attention, before I dismiss this witness (clerk of court), to the fact that we have here the clerk of the board of elections with a card index, and we expect to place him on the stand and we want to establish by a comparison between the card index of the clerk and the card index of the clerk of elections, that all of the names that went into the jury box at the time of these drawings were the names of Republicans and Democra's and not of Socialists, and I wish, before this witness goes, to make a request for him to produce the card index for that purpose.

"The Court: I will not require the witness to produce the card index for that purpose, and I will not receive tes'imony of the clerk of the board of elections for that purpose.

"Mr. Sharts: Enter an exception to the ruling of the court on the ground that we expect to show by

the introduction of this testimony that the grounds of our second challenge are true.

"The Court: No. What you proposed to show, Mr. Sharts, was that a comparison of the card index kept by Mr. Miller of the names in the jury box with the records of the board of elections—I suppose that is for Cuyahoga County, but for any county—would show the names in the card index were Democrats or Republicans.

"Mr. Sharts: The point was simply this: We ourselves have not the list of names. It is possible we might have gone and copied all those names off his card index, but we did not do that. In order to put those names to the board of elections, first, it will be necessary for us to have the card index to do it with, and I simply asked——

"The Court: I am prepared to rule on the assumption that you asked the clerk to produce the card index showing the list of names in the jury box, and that you proposed to show those names to the clerk of the board of elections, and that you proposed to have the clerk of the board of elections check them and say that the names of those on his card index are Democrats and Republicans. Now you may have an offer of proof in that form, and I will sustain an objection to it, but where I checked you was that you were proposing to show by the witness that the allegations and statements of a certain specification were true. You stated in your specification a whole lot more than you offered to prove. I do not think you intended to put it in that way, but that is the impression you made in my mind.

"Mr. Sharts: Does your honor make it a part of the record, your ruling, so that it will not be necessary——

"The Court: Yes, I so rule that you may have an offer to prove that and an exception."

III. The trial court erred at the hearing of the challenge in refusing to admit testimony offered for the purpose of showing that the names selected and placed in the jury box and those drawn for jury service were taken exclusively from the names of landowners, property-owners, and capitalists, as shown by the following (printed Record, pages 185 and 32):

> "Q. State if you are personally aware, or if you have by investigation become aware, of the property qualifications, of the standing in the financial and commercial world, of any of the men whose names have been placed in the jury box by you.
>
> "Mr. Wertz: I object.
>
> "The Court: The objection to that will be sustained. I do not understand that the law under which we are operating disqualifies any man from being placed in the jury box or to serve on the jury because he has or has not property, and, therefore, the question is immaterial.
>
> "Mr. Sharts: Enter an exception on the ground that by this question defendants expect to establish the allegations of the third ground of challenge to the jury array.
>
> "Q. State whether or not the names placed in the jury box are the names of landowners, property owners, and capitalists?
>
> "Mr. Wertz: Objection.
>
> "The Court: The same ruling on that.
>
> "Mr. Sharts: Enter an exception on the same ground."

IV. The trial court erred in not sustaining the challenge on the fourth ground thereof, to wit, that the juries had been selected and drawn exclusively from the eastern division instead of the entire district, contrary to the Sixth

amendment, as shown by the following (printed Record, pages 186 and 32, testimony of Mr. Miller, clerk of court):

> "These jurors whose names have been selected are from the eastern division and from every county in the eastern division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out, and I cannot tell whether all the names from one county have been drawn out that have been put in and the list of names from that county has been exhausted, or whether still some are there."

V. The trial court erred in refusing to hear testimony offered to sustain the challenge on the ground that the clerk, without an order of the court directing him to select any parts of said division, in drawing the names for the grand jury did not draw any names from seven of the counties of the division, but drew six from Cuyahoga County, and in drawing the names for the petit jury drew none from eight counties within the division, but drew five from Cuyahoga, four from Columbiana, and three from Ashtabula, as shown by the following (printed Record, pages 187 and 36):

> "Q. I will ask you (clerk of court), in the drawing of the names for the grand jury, how many counties within the division are not represented by any person residing therein?
>
> "Mr. Wertz: I object.
>
> "The Court: I will sustain the objection to that, because I have a well-defined conviction that the fact that some counties were not represented in the drawing is not a valid objection.
>
> "Mr. Sharts: I would just like to call your honor's attention to the fact that the Judicial Code does not provide for drawing by lot; that is not the manner indicated by the Code. Enter an exception on the ground that defendants expect to show by the an-

swer that there were seven counties not represented by any names in that drawing.

"Q. I will repeat the same question with regard to the petit jury, for the purpose of the record. How many counties were unrepresented in the drawing for the petit jury?

"Mr. Wertz: I object.

"The Court: I sustain the objection.

"Mr. Sharts: Exception on the same grounds as before—that we expect to show by the answer of the clerk that there were eight counties from which no names had been drawn within the division.

"Q. I will ask the clerk to state how many names were drawn from Cuyahoga County?

"Mr. Wertz: I object.

"The Court: I will sustain the objection.

"Mr. Sharts: Enter an exception on the ground that we expect to show that there were five drawn from Cuyahoga County.

"Q. How many were drawn from Columbiana County?

"Mr. Wertz: I object.

"The Court: I sustain the objection.

"Mr. Sharts: Exception on the ground that we expect to show there were four drawn from Columbiana County.

"Q. How many were drawn from Ashtabula County?

"Mr. Wertz: I object.

"The Court: The same ruling.

"Mr. Sharts: Enter an exception on the ground that we expect to show that there were three drawn from Ashtabula County."

VI. The trial court erred in not sustaining the challenge upon the disclosure that the lists of names for jury service

had been improperly selected, as shown by the following (printed Record, pages 187 and 31):

> "Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used.
>
> "Mr. Wertz: I object.
>
> "The Court: I do not think that is a material line of inquiry, Mr. Sharts.
>
> "Mr. Sharts: Enter an exception, because we expect to show by this witness that he has made use of the files of the board of elections and has drawn therefrom names of partisans of the Republican and Democratic parties and excluded the names of adherents of the Socialist party.
>
> "The Court: In view of that tender of proof I will reverse the ruling and permit the question to be answered.
>
> "A. I obtained the names by writing to the common pleas judges of this division for various counties, and asking them to send me a list of men in their counties qualified to serve as jurors.
>
> "Q. Were the common pleas judges to whom you sent this request members of any political party?
>
> "Mr. Wertz: I object.
>
> "The Court: I sustain the objection to that question.
>
> "Mr. Sharts: Enter an exception, because we expect to show that the common pleas judges to whom this witness applied for names were all of them members of the Republican and Democratic parties and not of the Socialist party.
>
> "(Witness:) Other names that I used were those of men that I know personally, a very few, which I selected and put in, and occasionally some name will be suggested to me by some one and I place that name in a drawer, and some of those I select and

some of them I reject when I come to make up my list.

"Q. Do you know in what manner the list of names that were sent to you from the common pleas judges, as you have described, had been selected?

"A. Not in detail.

"Mr. Wertz: I object to the question. It would be hearsay.

"The Court: I sustain the objection to that question.

"Mr. Sharts: Enter an exception."

VII. The trial court erred in overruling the motion to quash the indictment, particularly on the following grounds: (1) The grand jury presented the indictment without these defendants having been charged with the offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case; (2) it fails to state that Schue was a citizen of the United States or a male person not an alien enemy, who had declared his intention to become a citizen, at the time said offense is alleged to have been committed; (3) it fails to state that the proclamation had been published at the time said offense is alleged to have been committed by these defendants, or was ever published; (4) it fails to negative the possible appointments provided for in subdivision third of section I of the draft act; (5) it alleges three separate offenses in one count; (6) it fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce, and procure Schue to commit the alleged offense, and fails to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet; (7) it charges these defendants as accessories.

VIII. The trial court erred in refusing leave to the plaintiffs in error to file a plea in abatement containing, among

other grounds, the following: Said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case (printed Record, pages 14, 15, and 19).

IX. The trial court erred in overruling the demurrer to the indictment, particularly on the following grounds: (1) The facts set forth therein do not constitute an offense against the laws of the United States; (2) it charges these defendants with being accessories to a misdemeanor; (3) the Selective Service Act and proclamation thereunder are unconstitutional (printed Record, pages 18 and 19).

X. The trial court erred, in the examination of the persons drawn for petit jury service, on their *voir dire*, to permit the following questions asked by the plaintiffs in error to be answered:

> "Mr. Sharts: Is there any man here that does not know the distinction between the Socialists and the anarchists?
>
> "Mr. Wertz: I object.
>
> "The Court: That is not a proper question.
>
> "Mr. Sharts: Is there any man here that does not know there is a very wide distinction between Socialists and anarchists?
>
> "Mr. Wertz: I object to that.
>
> "The Court: I will sustain the objection to that question. I am not going into a discussion of that question.
>
> "Mr. Sharts: Enter the exception of the defendants to the ruling of the court."
>
> (Printed Record, pages 197, 48.)

ARGUMENT.

I. *Indictment and Trial by Political Adversaries Exclusively.*

The trial court heard evidence on the challenge to the jury, but ruled out as irrelevant all evidence tending to show that the defendant's political adversaries exclusively were selected for the jury commission, jury lists, panels, etc.

Discrimination in selecting a jury invalidates (*Thomas vs. Texas*, 212 U. S., 278). Ordinarily, membership in an opposite political party is not ground for challenge (*Connors vs. United States*, 158 U. S., 408). But here the political controversy directly involved, the jury being required to decide as to the purpose and effect of political speeches, raised a strong presumption that jurors of an opposite political opinion would be hostile to defendants and partisans of the Government.

The defendants were entitled to "an impartial jury" (*Constitution, art. III, sec. 2, clause 3; Amendments V and VI*). This includes freedom from political hostility (*Bucks County Jurors*, 20 Pa. Co. Ct., 36).

This right descends from Magna Charta as a barrier against "the approaches of arbitrary power" (*Thompson vs. Utah*, 170 U. S., 343; Mr. Justice Field in *Charge to Grand Jury*, 2 Sawy., 667; *Ex parte Bain*, 121 U. S., 1, 10; *Lysander Spooner's "Trial by Jury"*). But the barrier is gone when the Government, by whatever means or chance, may secure a jury entirely of its partisans to try its political adversaries.

Section 276, Judicial Code, was framed evidently to guard against this danger by providing a bi-partisan jury commission. But it fails to meet the present contingency, "where both principal" political parties are supporting the Government's policies and a third party opposing.

Such section creates an inequality under the law, bestow-

ing special privilege and protection on some political organizations and partisans and excluding others. The theory of our political institutions is that "in the pursuit of happiness all avocations, all honors, all positions are alike open to every one."

Cummings vs. Missouri, 4 Wall., 277.
Ex parte Garland, 4 Wall., 333.
Butcher's Union Co. vs. Crescent City Co., 111 U. S., 746, 760; concurring opinion of Mr. Justice Bradley.
Soon Hing vs. Crowley, 113 U. S., 703.
Allgeyer vs. Louisiana, 165 U. S., 578.

The jury must be composed "of persons having the same legal status in society" as the defendant (*Strauder vs. West Virginia*, 100 U. S., 303). But when the defendants are of a political class excluded from the jury commission, they are not of the same legal status.

II. *Indictment and Trial by Jurors Adversely Interested.*

The speeches, the general meaning, intent, and effect of which the jurors were required to decide, were attacks upon "the capitalist class," viz., persons deriving an income mainly from rents, interest, and dividends, and were exhortations to the public to abolish such forms of property ownership as produce rents, interest, and dividends. The trial court rejected as immaterial evidence tending to show the jurors had been selected exclusively from persons of the class attacked.

Even the most remote pecuniary or other special interest in the outcome of a case usually bars one from jury service. Thus residents of a town which may receive the benefit of a penalty are not competent as jurors (*Alexander vs. Brockett*, Fed. Cas., No. 181; 1 Cranch C. C., 505; *State vs. Williams*, 30 Me. (17 Shep.), 484; *Hawes vs. Gustin*, 84 Mass. (2 Allen), 402). Petitioners for a new road have been held

incompetent on a question of damages between county and landowner (*Almand vs. Rockdale*, 78 Ga., 199). The smallest degree of interest is a decisive objection (*Lynch vs. Horry*, 1 Bay (So. Car.), 229). General hostility is good cause of challenge (*Brittain vs. Allen*, 13 N. C., 120).

Admitting that ownership of property is not a disqualification ordinarily, the circumstances of a particular case may create from certain forms of ownership a presumption of self-interest likely to prejudice the juror, at least to the extent of requiring the court to entertain an offer of proof.

A juror to be impartial must be "indifferent, as he stands unsworn" (*Co. Litt.*, 155 *b*. *Reynolds vs. U. S.*, 98 U. S., 145).

III. *A Jury Not of the State and District.*

The Constitution, Amendment VI, requires the jury to be "of the State and district."

The grand and petit juries were drawn exclusively from the eastern division of the district. The grand jury purported (on the indictment) to be "inquiring for that division and district." The jury commissioner resided in the western division; but the jury lists were confined to the eastern division.

If the eastern division be regarded as "the district previously ascertained by law," the jurors were selected by a commissioner not qualified under section 276, Judicial Code, because not "residing in the district."

But if "district," under the Sixth Amendment, means the entire district, it would seem a judge has no power constitutionally to limit the drawing of the jury to any part or division, although section 277, Judicial Code, purports to authorize him (*United States vs. Dixon*, 44 Fed. R., 401). A contrary position to that of Judge Hoffman in the Dixon case was taken by other district courts in *United States vs. Wan Lee*, 44 Fed. R., 707, and *United States vs. Ayres*, 46 Fed. R., 651. Counsel have found no decision by the Supreme Court on this question.

In the Ayres case Judge Shiras indicated a distinction in the Dixon case, viz., that there the jury purported to be of only the division. But if that be of value, it exists also in the present case, by the wording of the indictment.

The constitutional restriction, "which district shall have been previously ascertained by law," would seem to veto any authority in the judge to designate a part or division of the district. The framers of the Constitution evidently sought to safeguard the defendant against the exercise of any arbitrary power.

By the common law a juror of the "county" was "from every quarter of the county * * * some out of every hundred" (*Blackstone's Comm.*, Bk. III, chap. 23, pages 359-60; Bk. IV, chap. 23, page 302). The course of the common law as it existed at the time of the adoption of the amendment controls (*Thompson vs. Utah*, 170 U. S., 343). Therefore it would seem the framers of the Constitution meant by a "jury of the district" a jury from every quarter of the district.

The error complained of is, also, that even within the division several of the counties were not drawn from at all; the clerk's method of drawing produced this result, without an order of court designating any parts. Many State decisions hold that a jury drawn from only parts of a county constitutes a denial of the constitutional right.

Schaffer vs. State, 1 How. (Miss.), 238.
Zanone vs. State, 97 Tenn., 101.
People vs. Hall, 48 Mich., 482.
Hartshorne vs. Patton, 2 Dall. (Pa.), 252.
Gibbons vs. Van Alstyne, 9 N. Y. Sup. Ct., 156.
People vs. Kelly, 31 Hun. (N. Y.), 225.
Mandeville vs. Raynolds, 68 N. Y., 528.
State vs. Nash, 48 La. Ann., 194.
People vs. Coughlin, 67 Mich., 466.
Hewitt vs. Circuit Judge, 71 Mich., 291.
Babcock vs. People, 13 Colo., 515.
Wash. vs. Commonwealth, 16 Gratt. (Va.), 531.

The same reason would invalidate a jury drawn from only some counties of the division.

IV. *Jury Lists Improperly Selected.*

The trial court overruled the challenge, although the evidence disclosed that the clerk in getting names for jury service, instead of making the selection himself, left the selection to common pleas judges within the division.

It has been held where a jury list was prepared from names selected by others than the authorized officials, though afterwards approved by the commissioners, it is vitiated (*United States vs. Murphy*, 224 Fed. R., 554; *State vs. Austin*, 183 Mo., 478; *Louisville, N. & St. L. Ry. Co. vs. Schwab*, 127 Ky., 82). It was even held where a statute provided the judges should meet and select the list a grand jury was not properly organized where the list was prepared by a deputy clerk and submitted to the judges separately and approved by them separately (*Clare vs. State*, 30 Md., 165).

The need of guarding the selection of grand jurors was long ago recognized. Statute 11 Hen., 4, cap. ultimo, recites that inquests had been formerly returned by persons outlawed, fled to sanctuary for treason or felony, etc., and enacts: "That no indictments be made by such persons but by inquest of loyal subjects returned by the sheriffs or bailiffs duly, *without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it is void.*" (See Sir Matthew Hale's "History of Pleas of the Crown" (1st Am. ed.), vol. II, page 155.)

The question was raised before this court in *Rodriguez vs. United States*, 198 U. S., 156, but was disposed of on the ground that no exception had been taken. Mr. Justice Harlan said, however, in the opinion, "There are authorities which give some support to the view that this requirement is of substance, and not a mere 'defect or irregularity

in matter of form only.' (Rev. Stat., sec. 1025; Hulse *vs.* State, 35 Ohio St., 421.)"

V. *Indictment without Evidence.*

The plaintiffs in error moved to quash the indictment because it had been found without a sworn charge previously filed, without the record disclosing any witness sworn and sent before the grand jury in this matter, or any action taken on the grand jury's own knowledge. The motion was overruled. They also offered a plea in abatement on this ground, which the court refused to entertain.

Jury trial should be according to the course of the common law as it existed at the time the constitutional amendment was adopted (*Thompson vs. Utah*, 170 U. S., 343). Neither Federal courts nor Federal grand juries may assume any larger powers over the liberty of any person than therein accorded.

The common law did not admit of a grand jury's finding an indictment without evidence of some sort. It might bring in a presentment, on the knowledge of one or more jurors, "signed by all the jurors" (*In re Grosbois*, 109 Cal., 445). But the presentment must be afterwards reduced to a formal indictment before any one could be required to answer to its charge.

Hale vs. Henkel, 201 U. S., 43, 60.

2 *Hawkins, Pleas of the Crown*, chap. 25, sec. 1.

Charge of Mr. Justice Field, 2 Sawy., 667; 30 Fed. Cas., #18, 255.

In the Matter of the Communication of the Grand Jury, in *Lloyd vs. Carpenter*, 3 Clark (Pa.), 188.

Commonwealth vs. Green, 126 Pa. St., 531.

In re Grosbois, 109 Cal., 445.

Jones vs. People, 100 App. Div. (N. Y.) 55; 92 N. Y. Supp., 275.

Collins vs. State, 13 Fla., 651.

Ex parte Chauvin, Charlt. (Ga.), 14.

State vs. Darnal, 1 Humph. (Tenn.), 290.
State vs. Millain, 3 Nev., 371.
State vs. Cain, 8 N. C., 352.
State vs. Cox, 8 Ark., 436.
5 *Bacon's Abridgement*, 98, tit. "Indictment."

In Lloyd *vs.* Carpenter and Commonwealth *vs.* Green, *supra*, the decisions are based on the constitutional right to be secure against unreasonable searches and seizures and against the issuing of a warrant without probable cause supported by oath or affirmation.

Constitution, Amendments IV and V.

Admitting that Federal grand juries may of their own motion call witnesses and institute prosecutions, this does not mean that they may indict without sworn statement of some sort. If the indictment is brought on their own knowledge it should so declare.

VI. *The failure of the indictment to state that Schue was a "citizen, or a male person not an alien enemy who had declared his intention to become a citizen."*

Selective Service Act, section 2:

> "Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive," etc.

Section 5, "That all male persons * * * shall be subject to registration," etc., must be so read as to harmonize with section 2. The act clearly applies to the "militia" as defined in the National Defense Act of June 3, 1916 (sec. 57). Any "regulations" by the President requiring others

than the "militia" to register are in excess of his authority, because "inconsistent with the terms of this act" (sec. 2).

> "However mutually located are the provisions of a statute, an indictment thereon, as on the common law, must aver all negatives necessary to show affirmatively an offense."
>
> I *Bishop's New Criminal Procedure* (4th ed.), sec. 637, page 375.
>
> *U. S. vs. Cook*, 17 Wal., 168.

The indictment being so framed as not to negative the possibility that Schue was either an alien enemy or an alien who had not declared his intention to become a citizen, failed to set forth an offense.

VII. *Failure of Indictment to Aver that the Proclamation had been Published.*

> "Every such person (subject to registration) shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction."
>
> Sec. 5, Selective Service Act.

There is no allegation that the President had published his proclamation before the actions of the plaintiffs in error complained of.

It is true, courts take judicial notice of proclamations, regulations, etc., in criminal pleadings (*The Greathouse Case*, 2 Abb. (U. S.), 382; *Jones vs. U. S.*, 137 U. S., 202; *Caha vs. U. S.*, 152 U. S., 211, 221). Federal courts have taken judicial notice of which regulation is referred to as violated, although the indictment does not state which (*U. S. vs. Moody*, 164 Fed. R., 269; *U. S. vs. Slater*, 123

Fed. R., 115). Or whether a Federal or a State statute is meant by the words "against the form of the statute" (*U. S. vs. Wright*, 28 Fed. Cas., No. 16,774). Or whether an indictment is correct in averring that Navassa Island, where the offense occurred, was within the jurisdiction of the United States (*Jones vs. U. S.*, 137 U. S., 202). None of these ambiguities, when cleared up, changed or added to the facts which concerned the jury.

But judicial notice cannot read into an indictment a material fact not there before. That would be to change the work of the grand jury, adding what was perhaps contrary to the grand jurors' intention.

Ex parte Bain, 121 U. S., 1.
U. S. vs. Howard, 132 Fed. R., 325, 344.

Whether the plaintiffs in error had aided, abetted, counselled, etc., *before the publication* of the proclamation or afterwards, was a fact quite material in determining whether they had committed any offense. It was for the grand jury, not the court, to supply this material allegation.

VIII. *Separate Offenses Charged in One Count.*

The indictment charges in one count that (1) Alphonse J. Schue failed to register; (2) Charles E. Ruthenberg *et al.* did "aid" him not to register; and (3) did "abet, counsel, command, and induce" Schue not to register.

Schue's offense is made a misdemeanor by section 5, Selective Service Act.

The offense of "aiding" is possibly created by section 6: "* * * and any person * * * otherwise evades or aids another to evade the requirements of this act * * * shall be guilty of a misdemeanor," etc.

The third offense is nowhere created by the act itself, but was said, at the hearing below, to be covered by section 332, Criminal Code.

It is elementary that only one offense can be charged in one count.

Bishop's New Criminal Procedure (4th ed), I, chap. 29, sec. 432.

U. S. vs. Sharp, Peters, C. C., 131.

IX. *Failure to Set Forth the Nature and Cause of the Accusation.*

Constitution, Amendment VI.

The indictment specifically states the offense of Schu, but for the others alleges only that they "well knowing said Schue to be such person subject to such registration, at Cleveland aforesaid, in said division and district, *before* and at the time of his so doing, unlawfully did aid, abet, counsel, command and induce said Schue in so unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto as aforesaid, and procure him to commit the offense involved in his so doing."

The general rule that it is sufficient in misdemeanors "to charge the offense in the words of the statute" (*U. S. vs. Mills*, 7 Pet., 142), must "be limited to cases where the words of the statute themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The crime must be charged with precision and certainty. * * * Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged (*Evans vs. U. S.*, 153 U. S., 584).

It is true this court has held "it is not necessary that the particular act by which the aiding and abetting was consummated be specifically set out" (*U. S. vs. Gooding*, 12 Wheat., 460). But it will be observed in all

cases holding as above, the nature of the act is so particularized that no reasonable doubt is left as to how the aider and abettor must have been connected with it if at all. Thus in *U. S. vs. Gooding, supra*, the defendant was charged as "owner" with procuring a ship to be fitted out for slave trading. See also *U. S. vs. Simmons*, 96 U. S., 360, 363; *Coffin vs. U. S.*, 156 U. S., 432, 448.

Nowhere is a hard-and-fast rule prescribed that there must be no specifying how the aiding and abetting was done. On the contrary, the courts have been careful to say, "there are doubtless cases where more particularity is required * * * the course has been to leave every class of cases to be decided very much on its own peculiar circumstances (*U. S., vs. Gooding, supra*).

Peculiar circumstances surround the present indictment. It charges Schue with *not* doing a certain thing, and the plaintiffs in error with aiding and abetting him beforehand in *not* doing it. Counsel have been unable to find any other case where a person is charged with helping another in negative conduct. Where a positive act is done, there is a definite center from which to work in discovering how another may have aided in the act. But where *nothing* is done, the mind gropes in infinitude. How did they "aid" Schue in *not* registering? As the evidence shows, they had never met Schue. They were engaged in multifarious political activities. Was Schue influenced by printed leaflets, form, letter, speech, song, public exhortation, private appeal? And when? Where? The indictment says, "before." How long before? All they could know till the moment of trial was, they were charged with "aiding" a man unknown to them, somewhere in Cleveland, sometime before the registration, *not* to register. It was a legal ambush into which they were driven blindfold.

The offense, if at all, is a statutory misdemeanor. There is no "aiding and abetting" a misdemeanor at common law. The words, therefore, have not a strict technical meaning,

as at common law. They are "to be understood as in the common parlance, and import assistance, co-operation, and encouragement."

U. S. vs. Gooding, supra.
U. S. vs. Lombardo, 241 U. S., 73.

The words have no strict technical meaning, the reasoning of Mr. Justice Wood, in *U. S. vs. Britton,* 107 U. S., 655, on a similar phrase, is applicable.

> "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle.' * * * They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one" (cited and emphatically approved by Mr. Justice Field in his dissenting opinion in *Evans vs. U. S., supra*).

The words "aid, abet, counsel, command, and induce" are generic terms. They are conclusions, not facts. Facts are to be stated, not conclusions.

U. S. vs. Cook, 17 Wall., 168.
U. S. vs. Cruikshank, 92 U. S., 542.

As these generic terms are applicable to many different kinds of facts, how may we know which set of facts was found by the grand jury to constitute "aiding and abetting?" The grand jury may have based its indictment on an entirely different set of facts from those on which the petit jury was asked to base its verdict.

The logic of Mr. Justice White, in his dissenting opinion in *Rosen vs. U. S.*, 161 U. S., 29, 43, applies here:

> "* * * how can it be said that there has been such a presentment, when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to the obscene? * * * The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else have power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards."

The plaintiffs in error were entitled to know not only the "nature" but the "cause" of the accusation. What were the facts which caused the grand jury to charge them with this offense? The field of conjecture left open by the vague wording of the indictment is so wide that the plaintiffs in error were deprived of their constitutional right.

X. *Accessories to a Statutory Misdemeanor.*

In misdemeanors there are no accessories either before or after the fact.

U. S. vs. Sykes, 58 Fed. R., 1000.
Charge to Grand Jury, 2 Curt. (U. S.), 637; 30 Fed. Cas. No. 18,250.
U. S. vs. Hartwell, 3 Cliff., 221; 26 Fed. Cas. No. 15,318.
U. S. vs. Gooding, 12 Wheat., 460.

The indictment, however, attempts to charge the plaintiffs in error with being accessories before the fact to a statutory misdemeanor. No such offense being known to the common law, has it been created by statute? In *U. S. vs. Gooding, supra*, and other cases where persons were charged

with aiding and abetting a statutory misdemeanor, the statute creates the offense and provides the punishment for those who directly or indirectly by aiding and abetting commit the deed. No such provision for those "aiding and abetting" is found in the Selective Service Act, unless in section 6 ("any person who * * * otherwise evades or aids another to evade the requirements of this act"). But it would seem that clause is limited to those charged with the duty of carrying into effect the provisions of the act.

The indictment follows not the language of section 6, however, but section 332, Criminal Code: "Whoever directly commits any act constituting an offense defined by any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

But this is not a penal statute creating new offenses; it regulates the punishment of offenses already created. It is not worded like a statute creating new offenses. "The legislative authority must first enact a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

U. S. vs. Hudson, 7 Cranch, 32.
U. S. vs. Brewer, 139 U. S., 278.
U. S. vs. Lacher, 134 U. S., 624.
Ballew vs. U. S., 160 U. S., 187.
U. S. vs. Eaton, 144 U. S., 677.

As a criminal statute it would be void for indefiniteness, "offering no standard of conduct it is possible to know in advance and comply with."

International Harvester Co. vs. Kentucky, 234 U. S., 216.
Tozer vs. U. S., 52 Fed. R., 917, 919.

The history of section 332 bears out this view. It was taken partly from Rev. St. 5323 ("Every person who knowingly aids * * * to commit any murder * * * is an

accessory before the fact") and Rev. St. 5427 ("Every person who * * * aids or abets * * * in the commission of any felony denounced in the three preceding sections," etc.), and made of general application. "Where the charge is of crime, it must have clear legislative basis."

U. S. vs. George, 228 U. S., 14.
Williamson vs. U. S., 207 U. S., 425.

The misdemeanor with which Schue is charged is the violation of not a statute, but a regulation or proclamation of the executive department. The Supreme Court has carefully distinguished between a thing "required by law" and a thing required only by regulation. Unless the regulation is clearly within the authority conferred by the statute, a violation of it has been held not to be a violation of a thing required "by law."

U. S. vs. Eaton, 144 U. S., 677.
U. S. vs. George, 228 U. S., 14.

With this scrupulous care against allowing offenses to be created "by regulation," it would seem that where the Selective Service Act itself has not seen fit to extend its punitive clauses to the wide and ill-defined field of indiscreet disobedience, the court is not justified in the inference that the legislative power meant to prescribe a punishment for "aiders and abettors" as well as for those who directly disobey the President's proclamation and regulation. If Congress had meant to extend its punitive power so far, it could easily have said so.

XI. *The Selective Service Act is unconstitutional and void in all its parts, for the reasons following:*

A. *Its Terms are Beyond the Powers of Congress.*

The "main design" of the act is to provide for calling forth the "militia" designated as such by the National Defense Act of June 3, 1916, section 57.

The power of Congress here is limited to three purposes: "to execute the laws of the union, suppress insurrections, and repel invasions."

Constitution, art. I, sec. 8, c. 15.

The main design of the act is not within these limitations. It is to send armies abroad to engage in a foreign war. The amendment of June 1, 1917, which refers to "serving without the United States," and the President's proclamation, indicate this. It refers to "the existing emergency," which is not within these limitations, as the court may take judicial notice.

United States vs. Hamburg American Co., 239 U. S., 466.

The title is: "An Act to authorize the President to increase temporarily the Military Establishment of the United States."

Compare it with the act of February 28, 1795:

> "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia," etc.

And with the Draft Act of March 3, 1863:

> "Whereas there now exists in the United States an insurrection and rebellion against the authority thereof, and it is, under the Constitution of the United States, the duty of the Government to suppress insurrection and rebellion," etc.

This court has often held that when the terms of a statute are so broad as to extend beyond the power of Congress, the courts are not at liberty to introduce words of limitation to bring it within that power.

The Trademark Cases, 100 U. S., 82.
James vs. Bowman, 190 U. S., 127.

U. S. vs. Reese, 92 U. S., 214.
U. S. vs. Ju Toy, 198 U. S., 253.
McKenzie vs. Hare, 239 U. S., 299, 308.

If the "main design" is beyond the limited power of Congress, the registration clause, with its punitive provision, is also void, being merely auxiliary.

Virginia Coupon Cases, 114 U. S., 269.

But it will be urged, Congress derives its power herein not from the clause recited but from article I, section 8, clause 12: "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

The Supreme Court has never passed on this question. In *Martin vs. Mott,* 12 Wheat., 33, it held the act of February 28, 1795, valid. But that act authorized the President, in cases of invasion, &c., to call forth the militia by requisition on the Governors of States. In *Kneedler vs. Lane,* 45 Pa. St., 238, the Pennsylvania judges rendered an opinion on the Draft Act of 1863. But that decision is not in point here because: (1.) the act of 1863 was expressly for suppressing insurrection, and (2.) it was finally decided that the act of 1863 was not a calling forth of the "militia," but a raising of armies.

If the power "to raise and support armies" implies enforced levies upon the citizenship of the States when necessary, and this power is unrestricted by the limitations on calling forth the militia, it may be conceded the Congress might proceed to raise armies in that way. But that cannot be contended for the present act, since the National Defense Act, section 57, has designated the men drafted hereunder as "militia." If "militia," Congress can call them into the service of the United States only in the manner and for the limited purpose described.

But it may be urged the "militia" drafted directly by the

Federal Government under this act is a national militia, as distinguished from the State militia. As the Constitution does not so distinguish, it would be highly presumptuous to discover such a blighting distinction lurking among the implied powers attendant upon the power "to raise and support armies."

It is unbelievable that the framers of the Constitution, who so jealously guarded and limited the Federal Government's power to call forth the State's militia, lest it strip from the State and the people that which their race-history had taught them to cherish as the shield of their liberties against despots, meant at the same time to leave an implied power whereby Congress might accomplish the very thing. The two powers, of State and Federal Government, over the same "militia" are mutually destructive. They are incompatible.

The purpose of the framers of the Constitution was to guard against encroachments by the central authority upon the liberties of the people. They feared a big army under its control. That fear shows itself in many clauses. Thus, they limited "appropriations of money to that use" to two years. They reserved "to the States respectively the appointment of the officers and the authority of training the militia." They declared "a well-regulated militia" to be "necessary to the security of a free State," and forbade infringement of "the right of the people to keep and to bear arms." These elaborate precautions for guarding the front door against encroachments of the Federal power are rendered ridiculous if the Federal Government may enter by a back door and possess itself of the militia.

The militia was a State institution before any Federal Government was created. Every State constitution provides for it. Every State has the undoubted power to draft its male citizens as a part of its militia. There is no evidence of any intention to relinquish any of this State power to the Federal Government. On this, as other subjects, all powers not delegated were reserved (Amendment X).

It is significant all English colonies—Canada, Australia, etc.—view the "militia" as a home defense, not subject to be drafted by the central power for foreign service. England depended on voluntary enlistments for foreign service until recently, when she changed her unwritten constitution by an act of parliament.

Stephens Commentaries on the Laws of England (15th ed.), II, chap. 8, page 646.

Madison in "*The Federalist*," No. XLVI.

Opinion by Judge Advocate General Crowder, to the Secretary of War, December 29, 1911.

Opinion by Mr. Wickersham, Attorney General, to the Secretary of War, February 17, 1912.

"*Opinions of Attorney General*," vol. 29, page 322.

"*An Address to the Congress of the United States*," by Mr. Hannis Taylor, recently published.

B. *It Attempts an Unconstitutional Delegation of Power.*

The power of Congress "to raise armies" is a direct power. But it may only "*provide* for calling forth the militia," implying that the actual calling forth is to be done for another than Congress.

As already shown, the Selective Service Act cannot be an exercise of the power to provide for calling forth the militia. But if it be an exercise of the power "to raise and support armies," Congress has delegated to the President the power which was entrusted only to it. It cannot delegate its power thus (*Cooley's Constitutional Limitations*, 7th ed., page 163). It may delegate power to determine some fact, but not to "make a law" (*Field vs. Clark*, 143 U. S., 683; *Monongahela Bridge Co. vs. U. S.*, 216 U. S., 177). The test is "whether Congress legislated on the subject as far as was reasonably practicable" (*Butterfield vs. Stranchan*, 192 U. S., 470; *Red Oil Mfg. Co. vs. Board of Agriculture*, 22 U. S., 380).

The Selective Service Act begins: "That in view of the existing emergency * * * the President be, and he is hereby, authorized—First, Immediately to raise." * * * Such are the provisions throughout. Everything is left to the President's "discretion." His powers are practically unlimited.

The fatal weakness of the present act is shown by comparison with the Draft Act of March 3, 1863: "Be it enacted * * * That all able-bodied male citizens * * * except as hereinafter excepted, are hereby declared to constitute the national forces," etc. Congress there raised the army itself.

If Congress may delegate thus its power to "raise" armies, it may also delegate to the President its power to "support" armies. And, if to the President, why not to any one else?

English history forbids the idea that the framers of the Constitution meant the power of raising armies to be exercised by any other than the legislative body directly responsible to the people. The Civil War of 1645-9 had been fought between armies raised by King Charles I and those raised by Parliament.

> "Under the guise of regulation, legislation cannot be exercised."
>
> *United States vs. George,* 228 U. S., 14, 20.
> *United Verde Copper Co.,* 196 U. S., 207.

C. It Violates the States' Right of Appointment of Officers and Authority to Train the Militia.

Returning to the other horn of the dilemma, if the Selective Service Act be an exercise of the power to "provide for calling forth the militia," it violates article I, section 8, clause 16, which reserves "to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

The act throughout authorizes the President "to draft

* * * organize, *and officer,*" etc. "To raise by draft * * * and to provide the necessary officers," etc. "The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training," etc.

D. *It Usurps Judicial Power.*

The act, section 4, authorizes the President, "in his discretion, to create and establish throughout the States * * * local boards. * * * Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the military establishment, to be chosen from among the local authorities. * * * Such boards shall have power * * * to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for *including or discharging individuals or classes of individuals* from the selective draft," etc. District boards are also authorized, with power "to review on appeal, and affirm, modify or reverse any decision of any local board. * * * The decisions of such district boards shall be final," subject to review by the President. * * * "Any member * * * may be removed and another appointed by the President, whenever he considers that the interest of the nation demands it."

The Constitution, Art. I, sec. 8, clause 9, empowers Congress "to constitute tribunals inferior to the Supreme Court." Viewed as tribunals, these "boards" are not inferior but independent of the Supreme Court. Moreover, they are not constituted by Congress itself, the power to create them is delegated to the President. By Art. III, sec. 1, "the judges * * * shall hold their offices during good behavior, and shall at stated times receive for their services a compensation." None of these safeguards to an independent judiciary obtain.

It will be urged they perform only a ministerial function, but that is not true. That they are called "boards" is immaterial. We must look to "the substance and intent" (*United States vs. Ferreira*, 13 How., 40). The claims to be decided are not mere claims against the government for damages etc., as in *U. S. vs. Ferreira, supra*, and *U. S. vs. Ritchie*, 17 How., 525. Nor preliminaries to a court finding, as in the latter case. The question involved is the personal liberty of the citizen, of which he is not to be deprived without "due process of law" (Constitution, Amendment V). The Selective Service Act attempts to make the registration strip the citizen automatically of his civil rights, his right of recourse to the ordinary courts, etc. (Sec. 5) "All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom," etc.

This is judicial power, and must be exercised by the regular judicial tribunals, unless the citizen whose liberty is involved be in the military or naval service (*"Ex parte Milligan*, 4 Wall., 447; Fong Yue Ting *vs.* U. S., 149 U. S., 698, particularly the dissenting opinions of Mr. Justice Brewer, Mr. Justice Field, and Chief Justice Fuller. See also *Interstate Commerce Commission vs. Brimson*, 154 U. S., 447).

The only alternative is, that the citizen thus subjected to the decision of the "boards" is already in the military or naval service. The Constitution, art. 1, sec. 8, clause 16, empowers Congress "to provide for organizing, arming and disciplining the militia and the governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

In the Constitutional Convention, "Mr. King, by way of explanation, said that by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying

the kind, size and calibre of arms—and by *disciplining*, prescribing the manual exercises, evolutions, etc."

Elliot's Debates on the Federal Constitution (Lippincott, 1907), vol. V, page 464.

As the power of Congress to *govern* the militia is restricted to "such part of them as may be employed in the service of the United States," it cannot extend to citizens not yet so "employed." The Selective Service Act does not by its terms justify such a construction. It is different from the Draft Act of 1863, which enacted "that all able-bodied citizens are hereby declared to constitute the national forces." It merely declares certain citizens "subject to draft into the forces hereby authorized, unless," etc.

It follows that the citizens whose liberties are affected are not yet in the military or naval forces of the United States, and the Federal Government has no power under the Constitution to deprive them of their right to resort to the judicial tribunals provided by law. The "boards" which Congress has attempted to authorize the President to establish, subject entirely to his will, are unconstitutional, both in the method of their establishment and their functions.

E. *It Deprives Citizens of the Due Process of Law.*

The act requires certain persons, under penalty, to register; it subjects those registered persons to the final decision of "boards" on whether they shall be forced into the military service or left free to follow their usual avocations; said "boards" are governed in their procedure, not by the rules of law, but by rules and regulations prescribed by the President. This clearly deprives such persons of their liberty without due process of law.

Constitution, Amendment V.

Due process of law means the same as "by the law of the land" in Magna Charta (*Murray's Lessee vs. Hoboken Land*

Co., 18 How., 272). Magna Charta, among other securities of rights and liberties, declares: "nor will we, (the king) proceed against him, *nor send anyone against him by force of arms,* unless according to the sentence of his peers, or by the law of the land." This should protect a citizen against the use of military power to deprive him of his personal liberty until after due process of law.

> "The words 'by the law of the land' as used in the Constitution do not mean a statute passed for the purpose of working the wrong."
>
> Cooley's Constitutional Limitations, 1st ed., chap. XI, page 354.

> "They were intended to secure the individual from the arbitrary exercise of the powers of government; unrestrained by the established principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> *Yick Wo vs. Hopkins,* 118 U. S., 356, 369.

No statute could leave more "room for the play and action of purely personal and arbitrary power" than the Selective Service Act. It leaves to the President complete control of the "boards," their members, their rules of procedure, etc. It leaves him completely in control as to how many are to be drawn for military service, when, and who. In addition to all specified numbers, he may raise "such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength" and "such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary." He is to decide when to stop voluntary enlistments and resort to draft; he prescribes the regulations for the draft; the drafted ones are to serve for no fixed time, but for "the existing emergency," which presumably he is to determine the length of; as he prescribes the rules and regulations for the exemp-

tion boards which he creates, he may determine what religious sects are to be recognized as entitled to exemption and what not; he may draft for partial military service county and municipal officials, artificers, workmen, and other persons employed in the service of the United States, pilots, mariners, etc. He "may utilize the service" of any or all officers of the several States, etc., "and all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the governor or other officer of any State or territory, to perform any duty in the execution of this act, are hereby required to perform such duty as the President shall order or direct," disobedience being made a misdemeanor.

If this be not leaving "room for the play and action of purely personal and arbitrary power," it is difficult to imagine what would be. A despot could ask no more. It makes no practical difference whether the depository be entitled King or President, the personal and arbitrary power at which Magna Charta and Amendment V were aimed is created by this act.

XII. *Refusal of Examination of Jurors on Whether They Confused Socialists with Anarchists.*

In order to exercise their right of challenge, the defendants attempted to question the petit jury on their *voir dire.* to ascertain if they confused Socialists with anarchists. The court declined to allow this line of investigation.

This was error, as defendants were entitled to inquire into the fitness of the persons called.

State vs. Steeves, 29 Ore., 96.
Hale vs. State, 72 Miss., 140.

The defendants were Socialist party officials; their political activities were directly involved. The court was bound to take judicial notice of the fact that anarchists have been legislated against and are the subject of widespread popular

disapprobation and prejudice. It was of extreme importance to the defendants, in the impassioned state of the public mind, that they ascertain beforehand and protect themselves by challenge in case any person drawn for jury service confused them with the anarchists.

Respectfully submitted,

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